

**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**



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Order Instituting Investigation into the State
of Competition Among Telecommunications
Providers in California, and to Consider and
Resolve Questions raised in the Limited
Rehearing of Decision 08-09-042

Investigation 15-11-007
(filed November 5, 2015)

**CALIFORNIA ASSOCIATION OF COMPETITIVE
TELECOMMUNICATIONS COMPANIES (CALTEL) RESPONSE
TO THE COMMUNICATIONS INDUSTRY COALITION'S MOTION TO STRIKE**

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Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure and Judge Bemserfer's ruling on July 20, 2016, the California Association of Competitive Telecommunications Companies (CALTEL) hereby files its opposition to the Communications Industry Coalition ("Coalition") Motion to Strike the all pre-filed written and oral testimony submitted in this proceeding by every party other than the Coalition members. The Coalition's grounds for the Motion – the lack of a hearing or cross examination -- is without merit and constitutes an improper collateral attack on prior Commission rulings.¹ Therefore the Motion to Strike should be denied in its entirety.

I. LEGAL STANDARD

The Coalition's Motion to Strike is contrary to at least two of the legal standards applicable to Commission proceedings. The Commission has substantial discretion on how to conduct its proceedings, for example by declining to adhere to California's rules of civil procedure or evidence.² The Commission, however, is mandated by statute to protect the due process rights of all parties appearing before it.³ The Coalition's request to gut the record by striking all non-member parties' testimony while leaving all of its own testimony in the record would clearly violate other parties' due process rights. The Coalition could have, but did not, offer to withdraw its own testimony should its Motion to Strike be granted.

Second, the Coalition's Motion to Strike all pre-filed written and oral testimony of non-member parties is contrary to the Commission's long-standing "preferred practice" of admitting

¹ The Coalition's Motion to Strike also moved to strike portions of pre-filed written testimony of parties other than CALTEL on additional grounds. CALTEL believes those other grounds are equally meritless but for the sake of brevity, will not address those other grounds in this Opposition.

² Cal. Pub. Util. Section 1701. All subsequent statutory references are to the California Public Utilities Code unless otherwise noted.

³ Section 1701.1

testimony into the record, and affording it only so much weight as the presiding officer considers appropriate.⁴

The Coalition's Motion to Strike should be denied as an improper effort to undermine other parties' due process rights by creating an artificial record that contains no unfavorable evidence. Further, the Motion to Strike attempts to deny the presiding officer's role as fact finder and decision maker to weigh all competing evidence before rendering a decision.

II. ARGUMENT

A. The Commission Is Not Required To Hold An Evidentiary Hearing

The Coalition renews its previous argument, which the Commission previously rejected, that evidentiary hearings are required to ensure its members' due process rights are protected. The Coalition attempts to strike opposing testimony purportedly on the basis that including such testimony in the evidentiary record would violate the due process rights of the Coalition and Section 1708 if such testimony "is relied upon in reaching findings that modify the "Uniform Regulatory Framework" ("URF") decision, D.06-08-030. . . ."⁵

The Commission considered and rejected this exact argument. In the July 1, 2016 Scoping Memo,⁶ the Commission rejected the claim made at the June 22, 2016 pre-hearing conference, that Section 1708 requires an evidentiary hearing be held in this proceeding.⁷ The Scoping Ruling included an extensive analysis of the issue and held:

The Commission has repeatedly rejected the notion, advanced at the PHC, that the Commission is required to hold a hearing. See, e.g., D.15-11-046 (In re Procurement Policies) ("We reject this argument [that a

⁴ Decision No. 07-10-034, 2007 Cal. PUC LEXIS 504, at p.171-172; *see e.g.* Administrative Law Judge's Ruling Denying Motion of Division of Ratepayer Advocates to Strike Rebuttal Testimony, A.06-02-023, p.2 (Feb. 24, 2006).

⁵ Motion of the Communications Industry Coalition's Motion to Strike and Objections to Proposed Official Notice, (July 22, 2016), at p. 2.

⁶ Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, July 1, 2016.

⁷ None of the parties, including the Coalition members stated in their pre-hearing conference statements that a hearing was required. *Id.*, at p. 6.

hearing is required] because no statute, rule, regulation or decision requires the Commission to hold evidentiary hearings. . . . Counsel for Respondents offered a variation on a theme: “If the Commission were considering changing the conclusions about the competitive market for voice services . . . the law requires an opportunity to have an evidentiary hearing.” We find no basis in law for that assertion. We thus conclude there is no statutory requirement for a hearing in this proceeding.⁸

The Scoping Memo correctly noted that Section 1708 simply requires that the Commission must provide notice and an opportunity “to be heard” to interested parties if the Commission intends to rescind, alter or amend any order or decision.⁹ Section 1708, on which the Coalition relies in its Motion to Strike, on its face plainly does not require an evidentiary hearing. Further, the Commission has made clear that Section 1708 is not triggered because:

We have repeatedly clarified that this docket is a data gathering and data analysis exercise. We have designed it to obtain a snapshot of telecommunications in California today, not to set (or repeal) rules. . . . no rules or regulations will be adopted (or repealed) in this phase of this proceeding.¹⁰

Undeterred by the Commission’s clear rebuke of its claim that an evidentiary hearing is required, the Coalition members filed a Motion for Reconsideration of the Scoping Ruling.¹¹ The Coalition members essentially stated that they don’t take the Commission at its word regarding the purpose and effect of this proceeding. The Motion stated, “the Scope & Briefing Outline in Appendix A to the Scoping Memo makes plain that the Commission will be reconsidering (and thus potentially rescinding, altering, or amending) a large number of the key conclusions in the URF I decision, which is the exact situation in which the parties said evidentiary hearings would be required.”¹² The Commission again ruled against the Coalition.¹³

⁸ *Id.*, at p. 9 (internal citations omitted).

⁹ *Id.*, at p. 8.

¹⁰ *Id.*, at p. 7.

¹¹ *Respondents’ Request for Rehearing of Scoping Memo Ruling on Evidentiary Hearings*, July 11, 2016.

¹² *Id.*, at p.3.

¹³ *Assigned Commissioner and Administrative Law Judge’s Ruling Regarding July 20, 2016 Evidentiary Hearing and Denying Related Party Motions*, July 13, 2016, at p.4-5.

“As we have explained above, and in the Scoping Memo, the Commission does not seek here to rewrite the Uniform Regulatory Framework decisions of eight and ten years ago respectively. Rather, the Commission seeks to determine what the market looks like as of December 31, 2016. . . . Thus, the question of rescission, alteration or amendment of a prior order is not before the Commission, nor is the predicate of Respondents’ Request, and the motion for rehearing of the scoping memo should be denied.”¹⁴

Now, the Coalition is using a different procedural vehicle to mount a collateral attack on the Commission’s decision that no evidentiary hearings are required in this proceeding. Final orders and decisions of the Commission are generally conclusive in all collateral actions and proceedings.¹⁵ The Commission considered and rejected the Coalition’s request for reconsideration on the issue of evidentiary hearings in this proceeding. There is no further appeal possible at this stage of the proceeding. The Presiding Officer’s decision on hearings is final and may not be attacked through a different procedural mechanism, namely a motion to strike, that would if granted, undermine the viability of the entire proceeding as a means to force an evidentiary hearing. Such collateral attack is improper and the Motion to Strike should be denied in its entirety.

There are ample examples of Commission proceedings in which party positions were submitted into the record via pre-filed written testimony with no evidentiary hearing. Such “All-paper proceedings” were found to uphold parties’ due process rights, especially in cases where the Commission was analyzing policy issues. For example, in the Comcast-Time Warner merger, a proceeding also categorized as rate setting, the Commission based its findings solely on submitted testimony and paper filings.¹⁶ Indeed, carriers such as Comcast, Time Warner and

¹⁴ *Id.*

¹⁵ *Stepak v. Am. Tel. & Tel. Co.*, 186 Cal.App.3d 633, 647 (1986)-.

¹⁶ *See, Administrative Law Judge’s Ruling Granting in Part and Denying in Part Motion of the Office of Ratepayer Advocates to Reconsider the November 13, 2014 Administrative Law Judge Ruling Resetting Schedule of Proceeding, A. 14-04-013, filed on November 26, 2014; See also, Joint Response of Comcast Corporation, Time Warner Cable Inc., Time Warner Cable Information Services (California), LLC*

Charter supported the ALJ's denial of evidentiary hearings, agreeing that the paper record was sufficient to protect parties' due process rights.¹⁷

Similarly, parties in the current proceeding have provided the Commission with a voluminous amount of submitted data and expert testimony such that evidentiary hearings and cross examination of witnesses are not necessary. In addition to the large number of data requests and data responses, parties have had three rounds of testimony and are scheduled to file two rounds of legal briefs. Due process demands only that parties have reasonable notice and "the opportunity to be heard at a meaningful time and in a meaningful manner."¹⁸ Clearly, the Coalition members have had a meaningful opportunity to be heard, numerous times, in this proceeding. The Coalition's claims otherwise are incorrect, and the Commission should deny the Coalition's Motion to Strike in its entirety.

B. Cross Examination Is Not Required To Ensure Evidentiary Due Process

The Coalition claims that the pre-filed written and oral testimony of every other party should be stricken on the basis that the lack of cross examination violates members' due process rights and Section 1708.¹⁹ The Coalition wrongly claims that they were "prevented from delving into the facts with any of the opposing witnesses or pointing out factual errors, omissions or lack of evidentiary foundation."²⁰ This assertion ignores the multiple opportunities Coalition members had to delve into the facts through three rounds of testimony (two of which provided an opportunity to examine, criticize and otherwise delve into the testimony of other parties) and the live hearing at which the Coalition's expert and percipient witnesses had the opportunity to

(U6874C), Charter Fiberlink CA-CCO, LLC (U6878C), and Bright House Networks Information Services (California), LLC (U6955C) to Motion of the Office of Ratepayer to Reconsider the November 13, 2014 Administrative Law Judge Ruling Resetting Schedule of Proceeding, A. 14-04-013, filed on November 21, 2014.

¹⁷ Application 14-04-013.

¹⁸ *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976).

¹⁹ Coalition Motion to Strike, at p. 6.

²⁰ *Id.*

question other witnesses and then to opine on those witness' testimony. Nonetheless, the Coalition contends that nothing other than cross examination by attorneys will ensure due process.²¹ The Coalition is wrong.

The Commission's prior decisions, California case law and California statutes make clear that the need for cross examination varies according to the type and circumstances of a case. For example, Section 1708.5 expressly states that a hearing (and therefore cross examination) is not required if the Commission order or decision being modified or rescinded was issued without a hearing. Further, formal cross examination is typically allowed in adversarial matters, but is not required when an agency is exercising its policy expertise such as in quasi-legislative proceedings.²² This proceeding is classified as rate setting, but it cannot fairly be claimed to be an adversarial proceeding such as a complaint in which a single party's rights will be affected or a legal determination of wrongdoing issued. As noted above, the Commission has repeatedly stated that the purpose of this proceeding is fact finding.

As the Coalition is likely aware, just two weeks ago, the Commission reaffirmed that cross examination is not required to ensure a party's due process rights in a rate setting proceeding. In a rate case for Kerman Telephone Company ("Kerman"), the Office of Ratepayer Advocates ("ORA") made recommendations in its Opening Brief regarding safeguards that should be instituted for transactions between Kerman's regulated and unregulated affiliates.²³ Kerman claimed that its due process rights had been violated because

²¹ It is especially puzzling that the Coalition complains that the expert witness panels provided insufficient opportunity to confront and challenge party's testimony since it was a member of the Coalition who suggested that experts should question one another rather than having attorney cross examination. July 20, 2016 Hearing Tr. 53:9-12.

²² *Manufactured Home Commodities, Inc. v. County of San Luis Obispo*, 167 Cal. App. 4th 705, 711-12 (2015).

²³ D.16-06-053, *Decision Adopting Intrastate Rates and Charges, Rate of Return, and Modifying Selected Rates for Kerman Telephone Company*, at p. 88.

the affiliate transaction proposal was presented in ORA's Opening Brief and Kerman therefore had no opportunity to cross examine ORA witnesses about the proposal.²⁴ The Commission held that due process did not require cross examination.

Kerman assumes that in all instances where there is an issue or proposal before the Commission, there will be an opportunity for cross examination in order to satisfy the requirements of due process. We are not aware of such a hard and fast rule, and the United States Supreme Court has not adopted such a rule to apply in all civil administrative proceedings.²⁵

The Commission cited case law from the U.S. Supreme Court as well as federal circuit courts making clear that due process does not require cross examination in all cases. In *Boddie v. Connecticut*, 401 U.S. 371, 378 (1971), the U.S. Supreme Court held that the "formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."

The Commission recited that in *Bennett v. National Transportation Safety Board*, the Court questioned the applicability of the right to confront witnesses in all administrative proceedings.²⁶ The *Bennett* Court held that the Constitutional right to confront witnesses through cross examination applies only in criminal prosecutions, not to civil administrative matters generally.²⁷ Instead, the Commission noted, a review of the authorities reveals that the concept of the opportunity to be heard is fluid and can mean either something less than a full evidentiary hearing²⁸ where there are no genuine issues of material fact to be determined by the particular issue; ²⁹ the opportunity to be heard through the presentation of written argument and

²⁴ *Id.*

²⁵ *Id.*, at p. 110-111.

²⁶ *Id.*, at p.111.

²⁷ 55 F.3d 495, 501 (10th Cir. 1995); *see also Hannah v. Larche*, 363 U.S. 420, 440 (1960) (the Sixth Amendment "is specifically limited to criminal prosecutions, and the proceedings of the Commission clearly do not fall within that category.").

²⁸ D.16-06-053, at p. 111.

²⁹ *Id.*, (citing *Matter of Grand Jury Proceedings Empanelled May 1988*, 894 F.2d 881, 882 (7th Cir. 1989) (in federal civil contempt proceeding, evidentiary hearing can be held only if there are genuine issues of

evidence;³⁰ or the right to cross examine the author when the author of a report is subject to subpoena and examination.³¹ In this proceeding, the assigned Commissioner and presiding officer have concluded that there is little factual dispute. The July 1, 2016 Scoping Ruling noted “[t]he parties appear to agree that facts at the granular level are relatively undisputed, but that the “factual propositions” or conclusions from those facts are disputed.”³²

Based on this clear case law that cross examination is not required, the Commission held that Kerman’s due process rights were protected because it “had the opportunity to respond with legal briefing of its own where it has set forth its factual and legal arguments why the Commission should not adopt ORA’s proposals.”³³ The Coalition members had two separate rounds of testimony to respond to other parties’ opening testimony, and even if it were argued that some information was raised in rebuttal testimony that had not been previously addressed, the Coalition and all parties have such opportunity in the two rounds of briefing that have been scheduled.³⁴

The Coalition does not explain how its members might have been able to “challenge the assertions” of other parties more effectively with live, time-limited cross examination than it was able to do with written testimony, for which the parties had time to prepare. Further, the

material fact); and *Landesman v. Board of Regents of State of New York* (1983) 463 N.Y.S. 2d 118, 94 A.D. 2d 827, 829 (“the regents review committee did not abuse its discretion or violate petitioner’s due process rights by denying petitioner’s request for an evidentiary hearing on the charge against him.”).

³⁰ Id., (citing *In Vill. Of Hales Corners v. Larson*, 320 Wis.2d 485 (Ct. App. 2009), 2009 Wisc. App. LEXIS 548 at *12 (“Denial of the opportunity to participate in oral argument, following a party’s full participation in the hearing and filing of briefs, does not deny procedural due process.”); and *Union State Bank v. Galecki*, 417 N.W. 2d 60, 142 Wis. 2d 118, 126 (Wis. Ct. App. 1987) (“We have found no case suggesting that denial of the opportunity for oral argument, following a party’s full participation in the hearing and filing of briefs, is contrary to accepted notions of due process or fair play in administrative hearings.)).

³¹ Id., (citing *Richardson v. Perales*, 402 U.S. 389, 407 (1971) (“The physicians’ reports were on file and available for inspection by the claimant and his counsel. And the authors of those reports were known and were subject to subpoena and to the very cross-examination that the claimant asserts he has not enjoyed.”)

³² July 1 Scoping Ruling, at p. 14.

³³ D.16-06-05, at p. 112.

³⁴ July 1 Scoping Ruling, at p. 15.

Coalition incorrectly assumes there will be “adverse actions” as a result of this proceeding. This proceeding is a fact-finding examination of competition in the telecommunications industry. There is no basis to assert that the Commission will take “adverse actions” against the Coalition’s members. Consistent with the requirements of due process, the Coalition has had and will have ample opportunities to “delve into the facts” and to challenge or question other parties’ assertions in this proceeding.

The Coalition cites three cases for the proposition that the “right to be heard” mandated in Section 1708 and to “challenge the alleged assertions that may form the basis for adverse actions by the Commission” requires a hearing and cross examination, not just paper testimony and pleadings.³⁵ The case law cited by the Coalition does not support this claim.

The Coalition relies on *Manufactured Home Commodities, Inc. v. County of San Luis Obispo*,³⁶ for the proposition that cross-examine is required, but this case does not hold that cross-examination is required in every instance. Indeed, the case distinguishes between different types of cases and notes that cross-examination is required in some but not all cases.³⁷ The Court held that in quasi-judicial cases, cross examination is required, but explicitly noted that cross may not be required in other instances.³⁸ The Court cited to prior case law in California holding that “[u]nlike cases that turn upon the testimony of live witnesses, cases involving documentary evidence do not carry a critical need to inquire into credibility via cross-examination.”³⁹ Similarly, *California Trucking Ass’n v. PUC*,⁴⁰ held only that *complaint* cases require evidentiary hearings with the opportunity to be heard and present evidence and

³⁵ Coalition Motion to Strike, at p. 7.

³⁶ 167 Cal. App. 4th 705, 711-12 (2015).

³⁷ *Id.*, at p. 711.

³⁸ *Id.*

³⁹ *Id.* (citing *Stardust Mobile Estates, LLC v. City of San Buenaventura*, 147 Cal.App.4th 1170, 1189 (2007) (italics in original))

⁴⁰ 19 Cal.3d 240, 245 (1977).

Massachusetts Bonding and Ins. Co. v. Industrial Accident Commission,⁴¹ involved the adjudicatory function of an agency.⁴² The Massachusetts Bonding Court noted that “[e]ven if regarded as a purely administrative agency, ... in exercising adjudicatory functions the commission is bound by the due process clause of the Fourteenth Amendment to the United States Constitution to give the parties before it a fair and open hearing.”⁴³ It should be further noted that in *Massachusetts Bonding*, the party alleging a violation of due process was denied both the opportunity to submit rebuttal testimony or to cross-examine witnesses offering medical reports in evidence. As stated many times herein, the Coalition members had the opportunity to submit three rounds of written testimony, two rounds of which provide rebuttal opportunities.

Unlike the adjudicatory cases relied on by the Coalition, this case is categorized as rate setting, and the record is documentary – multiple rounds of pre-filed written testimony. Thus the Coalition’s own cited authority does not support a claim that cross examination is required for pre-filed testimony, and the Coalition’s Motion to Strike this testimony is without merit. The only question under the *Manufactured Homes* holding, is whether statements made during the one-day hearing on July 20, 2016 required cross examination. The answer is plainly no. The witnesses appeared to answer questions about their pre-filed written testimony; they were not testifying on new subjects. Further, the witnesses, many of whom are expert witnesses, had the opportunity to question other witnesses and to opine on those live statements. Thus, even the in-person hearing provided an opportunity to the Coalition members’ witnesses to challenge other witnesses’ testimony, though through experts rather than attorneys. The exchange of experts about their pre-filed testimony did not require intervention from attorneys with further

⁴¹ 11 Cal. Comp. Cases 144, 74 Cal. App. 2d 911 (1946).

⁴² *Id.*, at p.145.

⁴³ *Id.*

questions to ensure due process, and the holding in *Manufactured Homes* does not hold otherwise.

III. CONCLUSION

The Coalition claims, incorrectly, that its members' due process rights were denied by the lack of an evidentiary hearing and ability to cross examine witnesses, and therefore the testimony of all other parties should be stricken. CALTEL demonstrates above that under California law and Commission precedent, an evidentiary hearing is not required to ensure due process. Rather, numerous Commission proceedings have been conducted with a documentary record. Further, CALTEL demonstrates that cross examination was not required because this is a rate setting proceeding in which parties have had ample opportunity to challenge other parties' testimony through rebuttal testimony and witness questioning of each other during the in-person hearing. On this basis, the Coalition's Motion to Strike should be denied in its entirety.

Signed and dated in Walnut Creek, CA this 2nd day of August, 2016

Respectfully submitted,

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